PROTECTION OF PRIVATE FOREIGN INVESTMENT BY MULTILATERAL CONVENTION

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Since the end of the first World War—an event widely considered to mark a turning point in the development of international law—several suggestions have been made to negotiate a multilateral treaty aimed at the protection of private foreign investment. In the post-World-War II period this movement has been particularly evident. The latest, and perhaps most important, of such efforts was announced in late 1957 by the Society to Advance the Protection of Foreign Investments,[1] an organization of businessmen in West Germany. A draft code was published by the Society in November, 1957. Entitled "International Convention for the Mutual Protection of Private Property Rights in Foreign Countries," the code is designed for use as a basis of negotiations among interested nations. Coming at precisely the point in time when world politics seemed to be entering a new phase,[2] the document may prove to be of some importance in the development of new patterns of economic relations among nations. As such, it should be of interest to international lawyers everywhere.

The writer's purpose here is to present a brief commentary and appraisal of the draft code. The main focus in this paper is factual—essentially that of reporting on a contemporary event—and what follows, therefore, should not be considered to be a critique of the code. The purpose here is to indicate, in brief form, some of the previous attempts along similar lines and to indicate the salient features of the present proposal, following which a few generalized statements will be made with regard to it.

I

The principal previous suggestion for a multilateral convention to protect the private investor is the still viable proposal in 1949 of the Inter-

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1 The Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen e. V.; its headquarters are in Cologne. According to its statement of purpose, "The Society unites independent personalities in German business, law and politics, their object being to help remove the disregard of vested foreign rights and interests in international business which has become more noticeable after the last war and make constructive suggestions upon how this unfortunate development can be reverted which is undermining the free world economy and international confidence."

2 That of economics. As Kruschchev put it in late 1957, "We declare war upon you in the peaceful field of trade."

national Chamber of Commerce, which in that year issued the draft of a code which resembles, but does not duplicate, the proposal of the German Society.[3] In 1957, the International Chamber of Commerce iterated its call for a lawmaking treaty to protect investment, this time proposing that ECOSOC, together with the International Bank for Reconstruction and Development and the International Finance Corporation, call a conference of interested groups to draw up a model international convention along the lines of the 1949 draft.[4] The International Chamber of Commerce said in 1957:

> Agreements, whether bilateral or multilateral, arising out of a model convention of this kind, would be of inestimable value to capital-importing countries as well as to investors. By making clear in advance in an agreed and binding form under United Nations' auspices the treatment to be applied to foreign capital in their territories, the former would improve their prospects of attracting capital from overseas. At the same time investors would be in a better position to assess some at least of the non-economic risks involved in a particular area.

In addition, considerable discussion both in and out of United Nations organizations concerning private foreign investment has taken place in recent years. For example, the International Industrial Development Conference (IIDC), convened in San Francisco in October, 1957, had as its main theme the preferred means of stimulating the flow of private capital to the less developed areas of the world.[5] At that conference, more than 550 business leaders from the free-world nations met to discuss problems of development. It was there that the present code was first broached by the German financier, Hermann J. Abs.

Within the United Nations itself, ECOSOC has been active in studying the problem. In a resolution dated August 9, 1956, that body urged

> governments of capital-exporting and capital-importing countries alike to continue their efforts to develop international confidence conducive to private investment, in conformity with the principles of the Charter of the United Nations. . . .[6]

The National Planning Association in Washington recently published a study of the problems of American private foreign investment written by Dr. Raymond Mikesell of the University of Oregon.[7]

[3] The ICC proposal may be found in its Brochure No. 129, entitled: "International Code of Fair Treatment for Foreign Investments."

[4] Resolution of the 16th Congress of the ICC, May, 1957, printed in its Brochure No. 193.

[5] The Conference was held under the joint auspices of Time-Life, Inc., and the Stanford Research Institute.

[6] Res. 619 (XXII), entitled "Financing of Economic Development," U.N. Doc. E/2929, ECOSOC, 22nd Sess., Official Records, Supp. No. 1, Aug. 17, 1956.

[7] Mikesell, Promoting United States Private Investment Abroad (NPA Planning Pamphlet No. 101, October, 1957). See also Proceedings of the 52nd Annual Meeting of the American Society of International Law, April, 1958, Panel VI: Legal Problems of International Private Enterprise, pp. 199–228; and Proceedings of the International Investment Law Conferences held in Washington, D. C., Feb. 24–25, 1956, and Nov. 21–

Among other similar developments there may be mentioned the provisions in the still-born International Trade Organization relating to foreign investment,[8] and the numerous bilateral treaties negotiated since World War II by the United States—the treaties of friendship, commerce, and navigation.[9] Congressional encouragement of this latter development is reflected, *inter alia,* in a provision in the Mutual Security Act:

> In order to encourage and facilitate participation by private enterprise to the maximum extent practicable in achieving any of the purposes of this Act, the President . . .
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> . . . . . .
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> (2) shall accelerate a program of negotiating treaties for commerce and trade, including tax treaties, which shall include provisions to encourage and facilitate the flow of private investment to and its equitable treatment in nations participating in programs under this Act.[10]

During the period between the two world wars, some additional efforts were also made, all of which proved to be ineffective.[11]

II

The code as drafted by the German Society consists of fifteen articles, designed as a whole "to resuscitate, on a reciprocal basis, the principle of inviolability of private property and other private rights." It is thought that this will afford "a material contribution to the re-establishment of international confidence in business relations, which will benefit recipients and investors of capital alike."[12] Three main points make up the essence of the proposal: the protection of the business activities of foreign investors; the establishment of international tribunals to deal with disputes; and enforcement of the code's provisions through the application of sanctions. "The ultimate goal," it is said, "must be to

22, 1958, sponsored by the American Society of International Law. See also Brandon, "Legal Aspects of Private Foreign Investments," 18 Fed. Bar J. 298 (1958).

[8] Art. 12 of the ITO Charter. In Brown, The United States and the Restoration of World Trade 271–272 (1950), it is suggested that the ITO, if given the opportunity, could have worked out a code for the protection of private investment.

[9] For discussions, see Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 A. J. Comp. Law 229 (1956); *idem,* "Provisions on Companies in United States Commercial Treaties," 50 A.J.I.L. 373 (1956); Wilson, "Property-Protection Provisions in United States Commercial Treaties," 45 A.J.I.L. 83 (1951).

[10] 68 Stat. 847 (1954), as amended, 70 Stat. 555, 558 (1956).

[11] *E.g.,* in 1931 the International Chamber of Commerce suggested treaty protection of private investment; and in 1929 a conference to that effect was held in Paris pursuant to Art. 23(e) of the League of Nations Covenant. See Lewis, The United States and Foreign Investment Problems, Ch. 12 (1948).

[12] The quotations are from the commentary on the draft code published with the code by the Society to Advance the Protection of Foreign Investments. This document is 67 pages in length, of which the greater part is devoted to statements of the reasons for such a code, the present status of international law as it relates to protection of private property, and the like.

arrive, on an international plane, at a system of effective and universally guaranteed legal protection such as applies on the national level." [13]

Articles IV through VIII set out the protections to be accorded private foreign investors. This would be accomplished through guarantees of the right of free economic or business activity on a non-discriminatory basis as between nationals and non-nationals.[14] Limitations on the freedom of business activity would be lawful only with respect to public utilities and like activities of vital importance to the state in question.[15] In addition, provision is made to protect against indirect measures unduly inhibiting business activity, such as levying incommensurate taxes, exclusion from raw materials, refusal to grant import licenses, and the like.[16]

A concomitant guarantee of equal importance would prevent expropriation of the assets of a private foreign investor for thirty years after investment.[17] When and if expropriation does take place, it would have to be compensated for adequately and promptly.[18] Finally, all of these protections for private property would be valid during war between any of the nations party to the convention, subject to the right of control of that property during the time of conflict.[19]

For handling disputes arising under the convention it is proposed that an international court be established, under a charter to be separately negotiated.[20] Another tribunal—an international arbitration committee—would be set up to decide questions concerning the adequacy, amount and form of compensation due following any expropriation of a foreign investment.[21] Provision is made for the convention to prevail over inconsistent national law; and of special interest is the clause providing that both the state and its nationals are entitled to rights under the convention. In other words, an individual would be permitted to assert "rights before all courts and government authorities." [22]

Sanctions would be twofold: by publicity and economic measures. Whenever any party to the convention took action in contravention of the code, as found by the international court, the court would have power to request cessation of the unlawful act within three months. Failing compliance, the court could then make public announcement of the delinquency.[23] If that proved ineffective, the court could then call for economic sanctions to be invoked against the offender.[24] Included in such measures would be the refusal of other parties to make loans to the delinquent, revocation of any most-favored-nation clauses which may exist, and other similar actions.

III

The considerable attention which the proposed code has received since its announcement indicates that it may reflect a felt need among Western

[13] *Ibid.*
[14] Art. IV.
[15] Art. V.
[16] Art. IV.
[17] Art. VI.
[18] Art. VII.
[19] Art. VIII.
[20] Art. X.
[21] *Id.*
[22] Art. IX.
[23] Art. XI.
[24] *Id.*

commercial interests.[25] Even so, without attempting any detailed analysis, there are a number of statements which can be made about the code which suggest some doubts as to its efficacy. While agreement to the provisions of the code by nations generally would doubtless tend to create a favorable climate for private investment, the assumptions on which it is based are subject to question. Among these assumptions, the following appear worthy of mention: (a) that a community of interest exists among would-be participants in the code; (b) that such a system would, granting that it would be efficacious in causing the flow of funds to points of need, serve the political goals of the West in the newly-declared trade war between East and West; and (c) that such a code of prescribed conduct would be obeyed and adhered to. These assumptions involve major problems, for a discussion of which a volume would be necessary. What follows is merely the statement of some of the questions raised by the underlying bases of the code.

First, does a community of interest exist? This broad question has two facets: as among the capital-exporting nations themselves, and as between the capital-exporting and the capital-importing nations. If it is granted without argument that the first of these facets does exist (an assumption in itself which may be of dubious validity),[26] there seem to be real problems existing between the exporters and importers of capital. This is particularly true as between the industrialized nations of the West and the less developed areas of the world—the very regions where capital is most needed but where, for a variety of reasons, it has not been flowing.[27] Without laboring the point, evidence as to the divergent views of spokesmen for the already industrialized nations and of the less developed nations is available in the addresses to the International Industrial Development Conference in San Francisco and at the meeting of the GATT Contracting Parties at Geneva in late 1957. At San Francisco serious doubts were expressed about the mutual benefit of private investment funds by representatives of such underdeveloped areas as the Philippines and Cuba.[28] And at Geneva, the attending ministers from other underdeveloped nations pointed to the growing disparity in wealth between the already industrialized and the non-industrialized nations as evidence that patterns of world trade were not mutually beneficial.[29]

The point here would seem to be not so much whether such fears are in

[25] *E.g.*, Time Magazine, Oct. 28, 1957; Life Magazine, Oct. 28, 1957; American Banker, Oct. 16, 1957; New York Times, Oct. 16, 1957; Journal of Commerce, Dec. 3, 1957; Financial Times (London), Nov. 27, 1957.

[26] A criticism of the concept of harmony of interests in international economic relations can be found in Myrdal, Economic Theory and Underdeveloped Regions (1957).

[27] See text at note 34 below.

[28] *E.g.*, by Miguel A. Cuaderno, Governor of the Central Bank of the Philippines and then Chairman of the International Monetary Fund, who expressed the feeling that peoples of the underdeveloped countries fear that private investments from abroad might dominate the economic, if not political, affairs of their nations. See New York Times, October 16, 1957. Cuba's Guillermo Belt called the proposed investment code "a return to the Gay Nineties." Time Magazine, October 28, 1957.

[29] *E.g.*, the Ministers from Ghana, Ceylon, and Indonesia.

fact valid, as that the leaders of the poorer nations of the world believe them to be so. Their attitude is by no means a recent one: as long ago as 1952 it was reflected in the resolution adopted in the United Nations General Assembly entitled "Right to Exploit Freely National Wealth and Resources." This resolution recommended that all Member States "refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources" and

> in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations.[30]

The question, accordingly, can seriously be raised as to whether the assumption of a community of interest between the exporters and importers of capital is valid.[31] What may be involved here is something to which, in another context,[32] this writer has given the label of the "Fallacy of Nineteenth-Centuryism." By that term is meant the notion that institutions suitable for one point in time can be refurbished and used at a later time when the conditions in which they operated differ markedly. This is a view of widespread currency; it underlies much of what has taken place in free-world economic patterns since World War II.[33] But it is a view profoundly in error.

[30] Resolution 626 (VII), Dec. 21, 1952, General Assembly, 7th Sess., Official Records, Supp. No. 20 (A/2361), p. 18. Both the International Chamber of Commerce and the National Association of Manufacturers expressed grave misgivings over the resolution. The ICC adverted to "the grave anxiety aroused in the business world" by the resolution, and asserted that emphasis should also be given to respect for contractual obligations, the duty of compensation in case of nationalization, and to the fair treatment of foreign capital and enterprise. ICC Brochure No. 175, p. 36 (July, 1953). See James N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources," 50 A.J.I.L. 854 (1956).

[31] To put it in another way, is there a community of interest in the present trading system between the already industrialized nations and the less developed countries? See, in this regard, Myrdal, note 26 above; Hilgerdt, "Uses and Limitations of International Trade in Overcoming Inequalities in World Distribution of Population and Resources," in 5 Proceedings of the World Population Conference 46 (U.N. 1955. XIII.8): "It is time to recognize that . . . trade has proved inadequate to bring about close international integration, both because of the special difficulties affecting economic relations among countries during the past twenty years, usually referred to as international economic disequilibrium, and for more fundamental reasons." *Ibid.* at 49.

[32] Miller, "Foreign Trade and the 'Security State': A Study in Conflicting National Policies," 7 Journal of Public Law 37, 91 (1958).

[33] The international economic institutions created in recent years, such as the International Monetary Fund and the International Bank for Reconstruction and Development, are essentially attempts to re-create patterns of commercial relations typical of the nineteenth century. They are examples of the difficulties which may be expected in attempting to refurbish institutional arrangements of a past era. Some remarks of the late Lord Keynes are meet in this connection: "I am . . . a hopeless skeptic about this return to nineteenth century laissez-faire, for which you [his correspondent] and the State Department seem to have such a nostalgia." Quoted in Harrod, The Life of John Maynard Keynes 567 (1951).

The second assumption on which the German proposal is based is that a system of international *laissez-faire* among the nations of the free world and, presumably, of the "uncommitted" world, would, if established, not only enhance the economic well-being of those nations but would also serve to further the interests of the free world *vis-à-vis* the Sino-Soviet bloc. But even if it is granted that the renascence of *laissez-faire* would further the well-being of the free world and of the uncommitted nations, it does not seem at all certain that private investment as such could effectively counter the economic moves of the Soviets. Private investment funds will tend to flow to those areas where the likelihood of profit is at the highest when balanced against the risk involved. But the very areas where capital may be most desperately needed may also be those from which the private investor may shy away.

The point here is that it is not at all certain that private capital will necessarily serve the political and strategic needs of the United States and the other free nations. Can, for example, the proposed system of private investment effectively counter bulk buying and other state trading activities carried on by the Soviet Union without regard to whether a profit is made? In this connection, some statistics cited by Mikesell in his recent study are instructive: At the end of 1955, of the 28.5 billion dollars in American private foreign investment, 56 percent went to Western Europe and Canada, 29 percent to Latin America, and 15 percent outside those two areas (one-half of which was devoted to petroleum).[34] The so-called Afro-Asian nations are at the bottom of the pipeline of private investment. Those are the nations which make up the area of contention in the economic war between the free world and the Soviets. Again, the question can seriously be raised as to the validity of the second assumption.

Similar statements can be made about the third basic assumption: Would promulgation of such a code mean that it would be effective? The question can seriously be raised as to whether the code would be effective under present conditions; and conversely, whether a code would be necessary if conditions were improved. What, in other words, may be lurking here are the twin fallacies of legalism and economism. Legalism is the notion, by no means uncommon, that enactment of a code of laws, or some piece of legislation, is all that is necessary to solve a problem.[35] And economism is the similar fallacy that economics can be divorced from politics; as it was put by Wilhelm Röpke, it is "the erroneous belief in the autonomy of the economic sphere as dominated by economic laws independent of institutions, legal forms, or social habits."[36]

Granted that negotiation and ratification of the proposed code would help in the maintenance of a climate beneficial to private investment; if conditions were such that promulgation of the code would be possible, it could be said then that there would be no real need for it. The

[34] Mikesell, note 5 above, at 15.

[35] The term is also used by Gardner, Sterling-Dollar Diplomacy 383 (1956), and by Röpke (although called "Juridicism") in his Hague Academy lectures entitled "Economic Order and International Law," 86 Recueil des Cours 207 (1954).

[36] Röpke, note 35 above. Again Gardner, note 35 above, also uses the term.

well-known doctrines of international law would serve adequately instead of the code. The third assumption thus can be questioned.

IV

What has been said in the paragraphs immediately above is in the nature of raising some fundamental questions about the proposed code, questions which should be resolved before serious attention is given the code. Action would be necessary to allay the fears of the capital-importing nations in what are now euphemistically called the "less developed" areas (as compared to their former designations as "backward" or "underdeveloped") that the proposed economic system would in fact redound to their detriment.[37] Then, too, a judgment would have to be made that the code would enhance the political and strategic, as well as the economic, interests of the capital-exporting nations. Finally, which should come first—the code or the conditions permitting use of Western economic techniques throughout the world?[38]

These, then, are the fundamental problems which must be resolved before negotiation of a code to protect private foreign investment. If not, then the effort may founder before it leaves port. But if those problems are met satisfactorily, then the "Magna Charta" of the private investor may yet become a part of international law.

[37] Compare the following statements made at the October, 1957, meeting of the GATT Contracting Parties:

Sir Claude Corea of Ceylon: There is a "persistent phenomenon of the failure of the exports of nonindustrialized countries as a whole to keep up with the general rate of trade expansion. . . . It seems likely that this trend will continue."

Shri T. Swaminathan of India: "You, Mr. Chairman [Sir Claude Corea], have drawn attention to the one significant fact in the trend of international trade, namely, that the commerce of the industrialized countries has expanded a good deal more satisfactorily than that of less developed countries."

Professor Sunardjo, Minister for Trade of Indonesia, after noting that a GATT report showed world trade at record levels in volume and value, maintained that: "the increase in value of international trade was mainly due to the expansion of trade among industrial countries, while the trade between industrial and nonindustrial countries showed unfortunately an unfavorable trend. . . . The progress made by the industrial countries has not been matched by the less developed countries, neither in respect of the expansion of international trade, nor in respect of economic growth."

[38] *Cf.* Brierly, "International Law: Its Actual Part in World Affairs," 20 International Affairs 381, 386 (1944): Order precedes law, "for it is never law that creates order."